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OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case:	Personnel Security Hearing
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Case Number:	TSO-0623

This Decision concerns the eligibility of XXXXXXXX(hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored.

I. Background

The individual is employed by the Department of Energy (DOE) and held an access authorization ("security clearance" or "clearance") as a condition of his employment. In 2006, the individual applied for a job at another agency and took a polygraph as part of the application process. The polygraph disclosed derogatory information regarding previous drug use, and the agency notified the local DOE security office (LSO). In August 2007, DOE suspended the individual's clearance. The LSO conducted a personnel security interview (PSI) with the individual in October 2007, but that interview did not resolve the security concerns.

In February 2008, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. Notification Letter (February 12, 2008). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (f), (k), and (l) (Criteria F, K and L).

Criterion F refers to information that a person "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 thru 710.30." 10 C.F.R. § 710.8 (f). DOE invoked this criterion based on information that the individual provided in 2006 on a security clearance application for another agency. The individual had falsely answered "no" to a question on the application as to whether he had used illegal drugs during the previous 7

years. On the same application, he also denied using drugs while holding a security clearance.

DOE invokes Criterion K when a person has allegedly trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k). DOE invoked Criterion K because, during a PSI in October 2007, the individual admitted smoking marijuana in the spring of 2004.

Criterion L is concerned with information in the possession of DOE that indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy or which furnish reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8 (l). With respect to Criterion L, the Notification Letter refers to derogatory information that raises concerns about the individual's honesty, reliability and trustworthiness. Specifically, the individual: (1) admitted that he had used marijuana in 2004, after certifying in 1991 that he would not use illegal drugs; (2) admitted his illegal drug use to another agency in 2006, but did not report his use to DOE; (3) admitted that he intentionally withheld information regarding his drug use during a polygraph administered by another federal agency; (4) used illegal drugs after signing a drug certification form and while holding a clearance, but did not report this information to DOE; and (4) may not have disclosed his entire drug use history and thus may still be subject to pressure and coercion.

In a letter to DOE Personnel Security on March 27, 2008, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual, who was represented by counsel, testified on his own behalf and elected to call three other witnesses. DOE counsel called the personnel security specialist, the individual, and one of the individual's witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Approximately one month later, I convened a supplemental telephonic hearing wherein the individual called a forensic psychologist and a counselor as witnesses. The personnel security specialist also testified at this hearing. The transcript taken at the telephonic hearing shall be hereinafter cited as "Tr2." Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." DOE exhibits are numbered, and the individual's exhibits are lettered.

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with

absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual's access authorization should not be restored at this time because I cannot conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

As a young man, the individual used drugs occasionally until 1979. Tr. at 20; PSI at 23-24. In 1991, he applied for a job with DOE and as part of the application process completed a document that disclosed his previous drug use. Ex. 8. According to the individual, he did not use any illegal drugs between 1979 and 1991. PSI at 63. In order to resolve the security concern surrounding his drug use, the individual signed a document certifying that he would not use drugs while holding a security clearance. Ex. 7. The individual began working for DOE in 1992. Tr. at 18. In 1996 and in 2001, the individual signed documents acknowledging that he understood that his use of illegal drugs could result in the loss of his security clearance. Ex. 5-6.

In the fall of 2003, the individual began to experience unusual stress in his life. His romance with a former colleague was deteriorating and his workload had increased significantly. More important, his mother, who lived a long distance from the individual, was in very poor health, and the individual was very busy travelling to her home and handling her financial affairs. His friends noticed a change in his personality. Because he felt depressed and had trouble focusing at work, he began to see a psychiatrist in March 2004. Ex. 4. The psychiatrist prescribed an antidepressant. Tr. at 36.¹ In April 2004, the individual's mother passed away. *Id.* at 38. Approximately one or two weeks after the death of his mother, a friend of the individual invited him to a concert to cheer him up. *Id.* at

¹ The individual was still taking the antidepressant at the time of the hearing. Tr. at 36.

41. The friend offered him marijuana, and he smoked some that evening after dinner. *Id.* at 46. According to the individual, he did not report the drug use to the LSO because he was embarrassed and concerned about the status of his clearance. *Id.* at 57.

In the spring of 2006, the individual applied for a job with another agency. As part of the application process, he completed a security application form. On that document, he denied using illegal drugs in the last seven years, and he denied using illegal drugs while holding a security clearance. Tr. at 67. As part of the application process, the individual also took a polygraph examination in October 2006. PSI at 4. He admitted that he intended to conceal his drug use from the agency. Tr. at 70. During the polygraph, the individual denied using drugs in the previous five years. PSI at 7. The individual stated that he did not admit using drugs because of embarrassment, a lapse of judgment and denial. Tr. at 70; PSI at 5-6. The polygrapher noticed an aberration in the results, and after the examination questioned the individual more closely about his response regarding illegal drug use. Tr. at 72; PSI at 9. In response to the heightened scrutiny of his answer, the individual admitted smoking marijuana in 2004. *Id.* at 73. In 2007, the agency reported the individual's drug use to DOE. *Id.* at 103. In August 2007, DOE suspended the individual's clearance. Ex. 1. DOE conducted a PSI with the individual in October 2007, but the PSI did not resolve the security concerns related to his use of drugs while holding a security clearance.

B. DOE's Security Concerns

The LSO invoked Criterion F because the individual did not disclose his use of illegal drugs on a Security Clearance Application submitted to another agency. There are substantial security concerns when an individual is not forthcoming with security personnel. "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." See Attachment to Memorandum from Assistant to the President for National Security Affairs, "Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information," at ¶15 (December 29, 2005) (Revised Adjudicative Guidelines). The individual admits that he did not disclose his drug use on the security form. Thus, I find that the security concern is warranted.

Criterion K deals with the use of illegal drugs. Illegal drug use may cause an individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. See Revised Adjudicative Guidelines at 11. Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder's attitude toward security requirements. See, e.g., *Personnel Security Hearing*, Case No. VSO-0448, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, Case No. VSO-0350, 28 DOE ¶ 82,756 (2000). The individual's drug use is well documented in the record, and validates the charges under Criterion K.

As for Criterion L, the LSO alleges that the individual: (1) violated a drug certification; (2) did not report his drug use to DOE; (3) intended to conceal his marijuana use while applying for a new job, but then revealed it after failing a polygraph; (4) may have been

vulnerable to coercion; and (5) may not have disclosed his entire drug use history. The individual's behavior demonstrates an unwillingness to comply with rules and regulations which indicates that he may not properly safeguard protected information. His dishonest conduct also raises questions about his reliability and trustworthiness. See Revised Adjudicative Guidelines, ¶ 15. Thus, the security concern under Criterion L is also valid.

C. Hearing Testimony

1. The Individual

At the hearing, the individual explained that prior to the incident in 2004, he last used drugs in 1979. Tr. at 20-22. He discussed the stressors in his life during 2004 that caused him to accept his friend's offer of marijuana. He was very depressed because of a failed romance, the recent death of his mother, and an exceptionally heavy workload. The individual admitted that he was not thinking of his clearance at the time that he smoked marijuana, but he was instead grieving the loss of his mother. *Id.* at 48. He knew that the friend who offered him marijuana used the drug herself occasionally, but did not think her drug use "had a bearing on their friendship." *Id.* at 59. The friend also knew that the individual had a security clearance. *Id.* at 91.

The individual admitted that he intended to conceal his drug use when he took the polygraph. *Id.* at 70. Although he occasionally thought about the time that he smoked marijuana, he never reported his drug use to DOE because he thought that disclosure to the other agency fulfilled his obligation to report. *Id.* at 76, 81. He does not currently see a psychiatrist and the stressors that allegedly caused his unusual conduct are no longer present in his life. *Id.* at 79, 227.

2. Character Witnesses

The individual offered the testimony of four character witnesses—his supervisor, two colleagues, and the friend who offered him marijuana. All of the witnesses described the individual as an honest and truthful person.

The individual's supervisor has managed the individual for two years, and described the individual as honest and frank. *Id.* at 119. He considered the individual's marijuana use a lapse in judgment that was markedly different from his daily observations of the individual's behavior. *Id.* at 128. The friend who furnished the marijuana in 2004 also described the individual as an honest person. She testified that she had observed the individual drink alcohol at social events, but had not observed him use any illegal drugs at any other time. *Id.* at 97.

A colleague, a close friend for 12 years, described the individual as honest and trustworthy. *Id.* at 132-136. She and the individual have long personal conversations twice a week, and socialize outside of the office. *Id.* at 140. She testified that in fall 2006, the individual told her that he had smoked marijuana in 2004. *Id.* at 146-147. He expressed remorse and, in response to her questions, he denied ever using drugs since that time. *Id.* at 147. She was very surprised that the individual used drugs at all, but has observed him since then

and has no reason to believe that he has used marijuana since that time. *Id.* at 148, 159. She believes that, based on their close personal relationship, the individual would tell her if he was using drugs again. *Id.* She does not believe the individual could be blackmailed. She described him as depressed and having trouble concentrating in April 2004. She testified that the psychiatric treatment seemed to help him. *Id.* at 160.

The other colleague had worked with the individual in the past, had a previous romantic relationship with the individual, and now considers herself a close friend. *Id.* at 169. She also described the individual in early 2004 as “not in control of his emotions.” *Id.* at 172. His behavior was erratic, but he improved a few months after the death of his mother. *Id.* at 183-185. He told her that he was remorseful about smoking marijuana in 2004, but that he had only used drugs that one time since 1979. She considers him very honest, reliable, and trustworthy. The witness maintained that the individual was not susceptible to blackmail because he is “an open book” and likes to maintain control of his life. *Id.* at 178. She does not believe he has used drugs since 2004, and is sure he won’t again because he was smoking to ease emotional pain that no longer exists. To her knowledge, with the exception of the 2004 incident, his only drug use occurred prior to college. *Id.* at 189. He is also embarrassed by what has happened and disappointed in himself. *Id.* at 177-179.

3. Expert Witnesses

During a supplemental telephonic hearing, the individual offered the testimony of a forensic psychologist and a substance abuse counselor. The forensic psychologist interviewed the individual in July 2006 for two hours and also administered the Personality Assessment Inventory. The psychologist also reviewed the individual’s record in this case and then completed a report of his evaluation. Tr2. at 5-13; Ex. D. He concluded that the individual has no psychopathic or antisocial traits, and testified that this conclusion is important in assessing the individual’s reliability and integrity. *Id.* at 13. He also concluded that the individual does not currently suffer from major depressive disorder. *Id.* at 67. According to the psychologist, the individual has some vulnerability to depression during times of relationship stress. He also concluded that the individual’s drug usage was “experimental in nature and quite remote.” Ex. D (Report) at 4. According to the doctor, “the polygraph is better at detecting lies in individuals who are more uncomfortable with lying.” *Id.* The psychologist concluded that the individual “did not exhibit a pattern of behavior that reveals a penchant for dishonesty or lack of integrity.” He blamed the individual’s unusual conduct on the stresses that occurred at that particular time in his life, and concluded that they are unlikely to recur. *Id.* at 5.

The substance abuse counselor testified that she completed a report on the individual in April 2008. Tr2 at 72. The individual had sought out an evaluation at her office on the advice of his counsel. *Id.* at 74. The counselor interviewed the individual for two hours, administered a Substance Abuse Subtle Screening Inventory (SASSI) test and then completed a comprehensive report. Results of her testing concluded that there is a low chance that the individual would use drugs again and a low probability that the individual suffers from either a substance dependence disorder or from substance abuse. *Id.* at 86, 87. The counselor did not recommend any treatment for the individual. *Id.* at 92.

4. Personnel Security Specialist

The personnel security specialist conducted the October 2007 PSI. *Id.* at 105; Ex. 3. She testified about the discrepancies that she found in the individual's responses during the interview that led her to conclude that the interview did not resolve the security concerns. The specialist was present during both the original and telephonic hearings, heard all of the witness testimony, and concluded that the new evidence presented during the proceedings was still insufficient to mitigate the security concerns in the Notification Letter. Tr2 at 94-98.

D. Mitigation of Security Concerns

1. Criterion F – Falsification

The concern in Criterion F arises from the individual's allegedly deliberate omission of his 2004 drug use on his security application. Hearing Officers have considered several factors in cases involving falsification including whether the individual came forward voluntarily to renounce the falsifications, *compare Personnel Security Hearing*, Case No. VSO-0037, 25 DOE ¶ 82,778, (OSA, 1996) (voluntary disclosure by the individual) *with Personnel Security Hearing*, Case No. VSO-0327, 28 DOE ¶ 83,005 (2000), *affirmed* (OSA, 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained, and whether a pattern of falsification is evident, *see Personnel Security Hearing*, Case No. TSO-0394, 29 DOE ¶ 82,984 (2006) (finding that pattern of falsification precludes mitigation of Criterion F concern). *See also Personnel Security Hearing*, Case No. TSO-0625, 29 DOE ¶ _____ (September 10, 2008); *Personnel Security Hearing*, Case No. VSO-0441, 28 DOE ¶ 82,825 (2001) (finding that voluntary disclosure of drug use mitigated Criterion F security concern).

After a review of the record in this case, I find that the individual has not mitigated the security concerns under Criterion F. First, the individual did not voluntarily disclose his marijuana use. He withheld that information from DOE for over two years, from 2004 until the agency that administered the polygraph reported the illegal drug use to DOE in 2006. The individual admitted that he did not intend to disclose the information to either DOE or to the other federal agency. Thus, there is no evidence in the record that the individual would have reported the derogatory information voluntarily. Second, the individual lied multiple times--on his SF86 and on his polygraph--displaying a pattern of withholding the truth during the security process. Since only two years have passed since the falsification was discovered, I conclude that not enough time has passed to establish a pattern of honesty. *See Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsification by denying drug use). Third, the falsifications are recent, occurring two years prior to the hearing. Fourth, during the period that the individual maintained the falsehood, he was vulnerable to blackmail, pressure or coercion. Finally, at the time of the falsification, the individual was a mature adult and had held a clearance for many years. *See Personnel Security Hearing*, Case No. TSO-0415, 29 DOE ¶ 83,049 (2007). In summary, I conclude that there is insufficient evidence in the record to mitigate the security concerns under Criterion F surrounding the individual's falsification of his security form and the polygraph.

2. Criterion K – Drug Use

According to the regulations, I must rely on the record and my observations at the hearing, and make a common-sense judgment on this matter as directed by 10 C.F.R. § 710.7(c). I have weighed several variables, including the circumstances surrounding the conduct, the potential for coercion, and the motivation for the conduct. On the negative side, it is troubling that the individual remains friends with the person who provided him with marijuana. However, for the reasons set forth below, I find that he has presented sufficient evidence to mitigate the security concerns regarding his illegal drug use.

First, the individual's witnesses and the individual himself credibly testified that he has abstained from the use of illegal substances since his last use in 2004, four years prior to the hearing. See *Personnel Security Hearing*, Case No. TSO-0625, 29 DOE ¶ ____ (September 10, 2008) (finding that 15 months of abstinence lends credence to testimony of individual that she does not intend to use drugs in future). Two experts testified that there is a very low probability that the individual suffers from substance abuse or dependence and that his drug use was not habitual. The individual also submitted a recent hair sample test that was negative for the presence of any illegal drug.

Second, I conclude that the drug use occurred one time, during a period of emotional distress. The witness testimony supports a conclusion that this was an isolated incident. According to the witnesses, the individual's behavior during early 2004 was erratic, and they had not observed him using drugs prior to the event, or at any time since then. During the spring of 2004, the individual was suffering through an unusual confluence of personal problems, especially the death of his mother, that threw him into depression. He sought help for these problems, and continues the therapeutic measures that helped him. I therefore find that the drug use is unlikely to recur. See Guideline H, ¶ 26 (a). In summary, the individual has convinced me through his demeanor and testimony and that of his witnesses that there is little likelihood that he will use illegal drugs again. His marijuana use was isolated and minimal. For the reasons set forth above, I conclude that the individual has mitigated the Criterion K security concerns in the Notification Letter.

3. Criterion L- Unusual Conduct

To mitigate the Criterion L concerns based on the violation of a drug certification and failure to disclose drug usage, the individual presented the testimony of witnesses who described him as honest, reliable and trustworthy.

I conclude that the individual has partially mitigated the security concerns relating to the possibility of blackmail. The individual has presented evidence that supports a conclusion that he is no longer subject to pressure, coercion or blackmail regarding his use of illegal drugs. The witnesses were aware that the individual was in the administrative review process because of his previous marijuana use. Two of them had known for at least a year. The individual's psychologist even remarked that the process had caused the individual to disclose his drug use to his friends and colleagues. Therefore, I find that the individual has mitigated the concern stated in the Notification Letter relating to the possibility of pressure, coercion and exploitation.

Notwithstanding the above, the individual has not provided sufficient mitigation of the additional concerns regarding his honesty that arose from his violation of a drug certification, failure to report his drug use to DOE and deliberate withholding of information on his polygraph. The relatively recent falsification of his 2006 forms and polygraph calls into question the individual's reliability in complying with the requirements of possessing a security clearance. He also admitted that he did not report his drug use to DOE in 2004 because he was afraid of the effect it would have on his clearance, and he admitted that he intended to withhold the information from the application process at the other agency. There is evidence of dishonesty in his actions based on his violation of the drug certification and his serial failure to report his illegal drug use. See *Personnel Security Hearing*, Case No. TSO-0360, 29 DOE ¶ 82,969 (2006) (finding failure to mitigate based on relatively recent falsification and lack of reliability in reporting information to LSO); *Personnel Security Hearing*, Case No. TSO-0550, 29 DOE ¶ ____, (January 3, 2008) (finding that a willingness to conceal information from DOE in order to maintain an access authorization is unacceptable). Therefore, I conclude that the individual has not mitigated the Criterion L concerns.

III. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f), (k), and (l). The individual has presented adequate mitigating factors for Criterion K, but has not fully mitigated the legitimate security concerns of DOE security as regards Criteria F and L. Thus, in view of the criteria and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: November 6, 2008